No. 14-562

In the Supreme Court of the United States

VALERIA TANCO, ET AL., PETITIONERS

v.

WILLIAM EDWARD "BILL" HASLAM, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

ABBY R. RUBENFELD
RUBENFELD LAW OFFICE, PC
2409 Hillsboro Road,
Ste. 200
Nashville, TN 37212

WILLIAM L. HARBISON
PHILLIP F. CRAMER
J. SCOTT HICKMAN
JOHN L. FARRINGER
SHERRARD & ROE, PLC
150 3rd Ave. South,
Ste. 1100
Nashville, TN 37201

MAUREEN T. HOLLAND
HOLLAND & ASSOC., PC
1429 Madison Avenue
Memphis, TN 38104

REGINA M. LAMBERT
7010 Stone Mill Drive
Knoxville, TN 37919

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP
One Metro Center
700 12th Street, N.W., Ste. 900
Washington, D.C. 20005
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com

CHRISTOPHER THOMAS BROWN
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

SHANNON P. MINTER
DAVID C. CODELL
CHRISTOPHER F. STOLL
AMY WHELAN
ASAF ORR
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Ste. 370
San Francisco, CA 94102

Additional counsel on inside cover

QUESTION PRESENTED

Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioners Valeria Tanco, Sophy Jesty, Ijpe DeKoe, Thomas Kostura, Matthew Mansell, and Johno Espejo were the appellees in the court of appeals.

Respondents William Edward "Bill" Haslam, in his official capacity as Governor of Tennessee, Larry Martin, in his official capacity as Commissioner of the Department of Finance and Administration of Tennessee, and Herbert H. Slatery, III, in his official capacity as Attorney General of Tennessee, were the appellants in the court of appeals.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 1
Introduction 2
Statement 3
A. Petitioners 3
B. Tennessee's marriage recognition law 6
C. Proceedings in this case 8
1. District Court proceedings 8
2. Appellate proceedings 9
Summary of argument 11
Argument:
I. Tennessee's refusal to recognize same-sex couples' existing lawful marriages warrants strict scrutiny because that refusal infringes upon fundamental rights and liberty interests protected by the Fourteenth Amendment 17
A. Tennessee's Non-Recognition Laws impermissibly infringe upon same-sex couples' fundamental right to marry 18
B. Tennessee's Non-Recognition Laws deprive same-sex couples of their liberty and privacy interests in their existing marriages 21

Table of Contents—Continued Page

II. Tennessee's Non-Recognition Laws warrant strict scrutiny because they infringe upon married same-sex couples' fundamental right to travel guaranteed by the Fourteenth Amendment 23

A. Because the right to travel to and through other states is an inherent right of United States citizenship, laws that unreasonably burden that right are subject to strict scrutiny 24

B. By nullifying same-sex couples' marriages under state law as the cost of traveling through or moving to the State, Tennessee unreasonably burdens those couples' right to travel 25

III. Tennessee's Non-Recognition Laws warrant heightened scrutiny under the Equal Protection Clause 30

A. At a minimum, this Court should apply *Windsor*'s "careful consideration" to Tennessee's Non-Recognition Laws 30

B. Tennessee's Non-Recognition Laws warrant heightened scrutiny because they discriminate on the basis of sex 34

1. Tennessee's Non-Recognition Laws expressly draw lines based on sex 35

2. Tennessee's Non-Recognition Laws discriminate based on sex by imposing overbroad gender-based expectations and stereotypes 36

Table of Contents—Continued Page

C. The Tennessee Non-Recognition Laws also warrant heightened scrutiny because they discriminate on the basis of sexual orientation 39

IV. Tennessee's proffered justifications for its Non-Recognition Laws do not satisfy any level of constitutional scrutiny 45

A. There is no rational connection between Tennessee's desire to provide stability to children and its refusal to recognize the marriages of same-sex couples 47

B. Deprivation of constitutional rights cannot be justified by appeals to tradition or to deference to the political process 50

C. Recognition of petitioners' existing marriages furthers, rather than undermines, principles of federalism 55

Conclusion 58

TABLE OF AUTHORITIES

Page(s)

Cases:

Attorney Gen. of N.Y. v. *Soto-Lopez*, 476 U.S. 898 (1986) 25, 26, 27, 28

Baker v. *Nelson*, 409 U.S. 810 (1972) 9

Bond v. *United States*, 131 S. Ct. 2355 (2011) .. 16, 55

Borman v. *Pyles-Borman*, Case No. 2014-CV-36 (Tenn. Cir. Ct. Aug. 5, 2014) 57

Bostic v. *Schaefer*, 760 F.3d 352 (4th Cir.), cert. denied, 135 S. Ct. 308 (2014) 55

Bourke v. *Beshear*, 996 F. Supp. 2d 542 (W.D. Ky.), rev'd, *DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014), cert. granted (No. 14-574, Jan. 16, 2015) 45

Bowers v. *Hardwick*, 478 U.S. 186 (1986) 44, 45

Bradwell v. *Illinois*, 83 U.S. 130 (1872) 38

Caban v. *Mohammed*, 441 U.S. 380 (1979) 37

Califano v. *Goldfarb*, 430 U.S. 199 (1977) 53

Carey v. *Population Servs. Int'l*, 431 U.S. 678 (1977) 21

City of Cleburne v. *City of Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) 43

Dunn v. *Blumstein*, 405 U.S. 330 (1972) 26, 27

Farnham v. *Farnham*, 323 S.W.3d 129 (Tenn. Ct. App. 2009) 6, 7, 32

Frontiero v. *Richardson*, 411 U.S. 677 (1973) 38, 39, 42

Griego v. *Oliver*, 316 P.3d 865 (N.M. 2013) 44

Cases—Continued: Page(s)

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 18, 21, 22
Heller v. *Doe*, 509 U.S. 312 (1993) 51
Hernandez-Montiel v. *INS*, 225 F.3d 1084 (9th Cir. 2000) 43
J.E.B. v. *Alabama*, 511 U.S. 127 (1994) 35, 37
Jantz v. *Muci*, 976 F.2d 623 (10th Cir. 1992), cert denied, 508 U.S. 2445 (1993) 44
Keith v. *Pack*, 187 S.W.2d 618 (Tenn. 1945) 7
Kerrigan v. *Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) 44
Kitchen v. *Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), aff'd, 755 F.3d 1193 (10th Cir. 2014) 45
Latta v. *Otter*, 771 F.3d 456 (9th Cir. 2014) 36, 38
Lawrence v. *Texas*, 539 U.S. 558 (2003) .....*passim*
Lenherr's Estate, In re, 314 A.2d 255 (Pa. 1974) 57
Lofton v. *Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) 44
Loving v. *Virginia*, 388 U.S. 1 (1967) .....*passim*
Lucas v. *Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964) 53, 54
M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996) 13, 19, 21, 22
Marriage Cases, In re, 183 P.3d 384 (Cal. 2008) 43, 44
Matthews v. *Lucas*, 427 U.S. 495 (1976) 42
McLaughlin v. *Florida*, 379 U.S. 184 (1964) 35

Cases—Continued: Page(s)

Memorial Hosp. v. *Maricopa Cnty.*, 415 U.S. 250 (1974) 25, 27
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 18
Padula v. *Webster*, 822 F.2d 97 (D.C. Cir. 1987) 45
Perez v. *Lippold (Perez* v. *Sharp)*, 198 P.2d 17 (Cal. 1948) 19
Plyler v. *Doe*, 457 U.S. 202 (1982) 43
Powers v. *Ohio*, 499 U.S. 400 (1991) 35
Rhodes v. *McAfee*, 457 S.W.2d 522 (Tenn. 1970) 7, 32
Richenberg v. *Perry*, 97 F.3d 256 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997) 44
Roberts v. *U.S. Jaycees*, 468 U.S. 609 (1984) 17, 22
Romer v. *Evans*, 517 U.S. 620 (1996) 40, 54
Saenz v. *Roe*, 526 U.S. 489 (1999) ..... *passim*
Shapiro v. *Thompson*, 394 U.S. 618 (1969) . 14, 25, 27
Shelby Cnty. v. *Williams*, 510 S.W.2d 73 (Tenn. 1974) 7
Smith v. *Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) 48
State v. *Bell*, 66 Tenn. 9 (1872) 7
Turner v. *Safley*, 482 U.S. 78 (1987) 10, 18, 20
United States Dep't of Agric. v. *Moreno*, 413 U.S. 528 (1973) 52
United States Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995) 56
United States v. *Guest*, 383 U.S. 745 (1966) 24

Cases—Continued: Page(s)

United States v. *Virginia*, 518 U.S. 515 (1996) 30, 34, 37, 42
United States v. *Windsor*, 133 S. Ct. 2675 (2013) ..... *passim*
Varnum v. *Brien*, 763 N.W.2d 862 (Iowa 2009) 44
Veney v. *Wyche*, 293 F.3d 726 (4th Cir. 2002) 44
Washington v. *Glucksberg*, 521 U.S. 702 (1997) 20, 21
Weinberger v. *Wiesenfeld*, 420 U.S. 636 (1975) 39
Williams v. *Fears*, 179 U.S. 270 (1900) 24
Williamson v. *Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) 30
Windsor v. *United States*, 699 F.3d 169 (2d Cir. 2012), aff'd on other grounds, 133 S. Ct. 2675 (2013) 42, 44
Woodward v. *United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990) 44
Zablocki v. *Redhail*, 434 U.S. 374 (1978) ..... *passim*

Constitutions and statutes:

U.S. Const. Amend. XIV ..... *passim*
Tenn. Const. Art. XI:
§ 3 54
§ 18 ..... 2, 7, 8
Ala. Code § 30-2-5 57

Statutes—Continued: Page(s)

Tenn. Code Ann.:
§ 20-5-107 50
§ 31-2-104 50
§ 36-3-113 ..... 2, 7
§ 36-5-101 49
§ 36-6-101 49
§ 36-6-103 49
§ 50-6-210 50
§ 56-7-2301 49

Miscellaneous:

American Psychological Association, *Resolution on Sexual Orientation, Parents, & Children* (2004), http://www.apa.org/about/ policy/ parenting.aspx. 48

James R. Browning, *Anti-Miscegenation Laws in the U.S.*, 1 Duke B.J. 29 (1951) 32

Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (2000)..... 36, 38, 39

Patrick Garvin, *A timeline of same-sex marriage in the US*, Boston Globe, May 20, 2014, http://www.bostonglobe.com/ 2013/06/26/same-sex-marriage-over-time/ mbVF MQPyxZCpM2eSQMUsZK/story .html..... 51

Luther L. McDougal III et al., *American Conflicts Law* (5th ed. 2001) 6

Miscellaneous—Continued: Page

Model Penal Code and Commentaries (Original Draft and Revised Comments 1980) 38

Social Security Administration (SSA):

Program Operations Manual System, RS 00202.001 (effective Aug. 12, 2013), https://secure.ssa.gov/poms.nsf/lnx/0300202001 6

Program Operations Manual System, RS 00207.001A (effective Dec. 4, 2014), https://secure.ssa.gov/poms.nsf/lnx/0300207001 6

Program Operations Manual System, GN 00210.002B (effective Dec. 3, 2014), https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210002 6

The Federalist No. 10 (James Madison) 53

In the Supreme Court of the United States

No. 14-562

VALERIA TANCO, ET AL., PETITIONERS

v.

WILLIAM EDWARD "BILL" HASLAM, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-100a) is reported at 772 F.3d 388. That court's order staying the district court's preliminary injunction (Pet. App. 101a-103a) is unreported. The opinion of the district court (Pet. App. 108a-130a) is reported at 7 F. Supp. 3d 759.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and 1343(a)(3). The court of appeals had jurisdiction under 28 U.S.C. 1292(a), and filed its judgment on November 6, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution is reproduced at Pet. App. 131a. Article 11, Section 18 of the Tennessee Constitu-

tion is reproduced at Pet. App. 132a. Tennessee Code Annotated Section 36-3-113 is reproduced at Pet. App. 133a.

INTRODUCTION

Petitioners are three married same-sex couples who moved to Tennessee to pursue their livelihoods. One couple was raising children before moving to Tennessee, and another has given birth to a child while living in Tennessee. Before relocating to Tennessee, each couple was lawfully married in the state where one or both spouses lived. Because Tennessee law prohibits the State from recognizing the legal out-of-state marriages of same-sex couples, the State treats petitioners' marriages as legal nullities, depriving petitioners and their children of the protections, obligations, benefits, and security that Tennessee readily guarantees to other married couples. See Tenn. Const. Art. XI, § 18; Tenn. Code Ann. § 36-3-113 (Non-Recognition Laws). For petitioners, therefore, the price of moving to Tennessee was loss of their legal status as married couples and as family members. This cost is also borne by their children, who find themselves without the protections and advantages arising from having married parents. Tennessee has long followed the "place of celebration rule," and recognizes marriages validly entered into outside the State, including those that could not validly be entered into within Tennessee, except where the marriage would be a crime within the State. Tennessee uniquely singles out for non-recognition the lawful out-of-state marriages of same-sex couples.

Petitioners challenged Tennessee's Non-Recognition Laws as impermissibly infringing upon their fundamental right to marry and burdening their

liberty interests in their existing marriages, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; as violating their fundamental right to interstate travel; and as impermissibly discriminating against petitioners based on sex and sexual orientation, in violation of the Equal Protection Clause. Breaking with the otherwise uniform recent view of the courts of appeals that exclusions of same-sex couples from marriage or marriage recognition are unconstitutional, a divided panel of the Sixth Circuit upheld Tennessee's Non-Recognition Laws.

The court of appeals' holding not only denies recognition and dignity to petitioners' marriages and families, but also establishes a checkerboard nation in which same-sex couples' marriages are dissolved and reestablished as they travel or move from state to state. That is the antithesis of the stability that marriage is supposed to afford. Petitioners ask this Court to reverse the court of appeals' judgment and to hold that the Fourteenth Amendment requires Tennessee to recognize petitioners' marriages.

STATEMENT

A. Petitioners

Petitioners' circumstances are representative of the many personal and career situations that may cause married couples to relocate their families to a new state.

Petitioners Dr. Valeria Tanco and Dr. Sophy Jesty married in New York, where they resided at the time, and subsequently moved to Knoxville, Tennessee, where they had accepted teaching positions at the University of Tennessee College of Veterinary Medicine. Petitioners Army Reserve Sergeant First Class Ijpe DeKoe and Thomas Kostura married in New York

while Mr. Kostura was residing in New York and while Sgt. DeKoe was stationed at Fort Dix in New Jersey, preparing to be deployed to Afghanistan. Following Sgt. DeKoe's return from Afghanistan, the couple moved to Memphis, Tennessee, where Sgt. DeKoe is now stationed. Petitioners Matthew Mansell and Johno Espejo married in California and adopted two children while residing there. They moved with their children to Franklin, Tennessee, when Mr. Mansell's employer—a law firm—transferred many positions, including Mr. Mansell's, to Nashville. Pet. App. 135a-136a, 144a-145a, 153a-154a, 158a-159a, 163a-164a, 169a-170a.

Before each couple moved to Tennessee, their respective states of residence recognized their marriages on an equal basis with all other marriages. Because of Tennessee's constitutional and statutory prohibitions on state recognition of same-sex couples' marriages, however, Tennessee treats petitioners' marriages as though they do not exist. There is no alternative way to secure the comprehensive protections, mutual obligations, and security and dignity of marriage that Tennessee law automatically grants to married opposite-sex couples and their children. To create even a small measure of protection for their families and to marginally reduce the legal uncertainty created by Tennessee's refusal to respect their marriages, petitioners and other legally married same-sex couples in Tennessee must take costly steps to prepare powers of attorney, wills, and other advance directive documents. Pet. App. 146a, 155a, 160a, 165a, 171a, 173a.

Drs. Tanco and Jesty had a child while this lawsuit was pending. Dr. Tanco is the birth mother. It was only because of the district court's (later stayed) preliminary injunction that Tennessee recognized Dr. Jesty as

a legal parent of their child at birth. Tennessee's Non-Recognition Laws also deprive the couple of other important family protections. In preparation for their child's arrival, Dr. Tanco and Dr. Jesty attempted to enroll in a single health insurance plan covering their entire family. Their request for enrollment in a family plan as a married couple was denied because their employer is a state university participating in the State of Tennessee's group health insurance plan, and Tennessee does not recognize their marriage. They were finally able to enroll in a family plan only because of the district court's preliminary injunction. They own a house together in Tennessee and have deeded the house to themselves as tenants by the entirety, as married couples may do. But because Tennessee law treats them as legal strangers, Drs. Tanco and Jesty lack the security of knowing whether Tennessee will in fact treat them as owning their marital home together as tenants by the entirety so that they may benefit from the legal protections that accompany that form of ownership. Pet. App. 138a-141a, 148a-150a, 175a, 178a.

Beyond the many legal protections denied to petitioners, Tennessee's refusal to recognize their legal marriages continually communicates to petitioners, to their children, and to other Tennesseans that the State regards petitioners and their families as second-class citizens. Pet. App. 137a-138a, 146a-147a, 154a-155a, 160a-161a, 165a-166a, 171a-172a. Drs. Tanco and Jesty want to protect their child from growing up under discriminatory laws that mark their family as different and less worthy. Pet. App. 141a-142a, 151a. For Sgt. DeKoe, a veteran of the war in Afghanistan, Tennessee's refusal to recognize his marriage to Mr. Kostura is particularly painful because he is denied the very free-

dom, liberty, and equality that he risked his life to protect. Pet. App. 156a. Mr. Mansell and Mr. Espejo have returned to California since briefing was complete at the petition-stage before the Court, but they continue to be harmed by Tennessee's denial of their marital status during the time they lived in Tennessee because certain federal benefits depend on the length of one's marriage, for which the federal government will look to the law of the state of residence.[1]

B. Tennessee's Marriage Recognition Law

Tennessee has long applied the rule that "a marriage valid where celebrated is valid everywhere." *Farnham* v. *Farnham*, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009) (quoting *Pennegar* v. *State*, 10 S.W. 305, 306 (Tenn. 1889)). This "place of celebration rule" recognizes that individuals order their lives based on their marital status and "need to know reliably and certainly, and at once, whether they are married or not." Luther L. McDougal III et al., *American Conflicts Law* § 204 (5th ed. 2001).

---

[1] See, *e.g.*, Social Security Administration (SSA), Program Operations Manual System, RS 00202.001 (effective Aug. 12, 2013), https://secure.ssa.gov/poms.nsf/lnx/0300202001 (claimant seeking spousal benefits must have been married continuously for one year prior to filing claim); *id.* at RS 00207.001A (effective Dec. 4, 2014), https://secure.ssa.gov/poms.nsf/lnx/0300207001 (nine-month and 10-year duration-of-marriage requirements for surviving spouse and surviving divorced spouse, respectively, to receive benefits); *id.* at GN 00210.002B (effective Dec. 3, 2014), https:// secure.ssa.gov/apps10/poms.nsf/lnx/0200210002 (SSA looks to "the laws of the state of the number holder's (NH's) domicile to determine whether [it] can recognize the marriage" for certain claims).

For well over a century, Tennessee has recognized marriages that were valid where celebrated even if the couple could not have married in the State, including: (1) common-law marriages, *Shelby Cnty.* v. *Williams*, 510 S.W.2d 73, 74 (Tenn. 1974); (2) marriages by parties who do not satisfy Tennessee's minimum age requirements, *Keith* v. *Pack*, 187 S.W.2d 618, 619 (Tenn. 1945); and (3) marriages based on the doctrine of marriage by estoppel, even though Tennessee does not permit such marriages under its own marriage laws, *Farnham*, 323 S.W.3d at 140. Before 1996, apart from unconstitutional anti-miscegenation laws that denied recognition of mixed-race marriages, see *State* v. *Bell*, 66 Tenn. 9 (1872) (refusing to recognize the existence of a lawful out-of-state marriage as a defense to criminal prosecution under Tennessee's anti-miscegenation laws), the limited exception to this established rule was for certain marriages lawfully contracted in another state where the relationship would have subjected one or both parties to criminal prosecution in Tennessee. See, *e.g.*, *Rhodes* v. *McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970) (holding an out-of-state marriage between a stepfather and a stepdaughter following the stepfather's divorce from the mother void where such marriage could be prosecuted as a felony in Tennessee).

In 1996, Tennessee enacted a measure that categorically denied recognition to an entire class of marriages—those of all same-sex couples, including couples whose marriages were validly entered into in other states. See Tenn. Code Ann. § 36-3-113. In 2006, this discriminatory treatment of same-sex couples was also adopted into the Tennessee Constitution. See Tenn. Const. Art. XI, § 18. The amendment expressly limits recognition to marriages of opposite-sex couples: "The

* * * relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state." The amendment further establishes a rule of non-recognition, but only for same-sex couples: "If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state *by the provisions of this section*, then the marriage shall be void and unenforceable in this state." *Ibid.* (emphasis added).

Tennessee's Non-Recognition Laws require the State to deny same-sex couples and their children all the protections, benefits, obligations, security, and dignity that Tennessee law provides for all other married couples, including those who legally married elsewhere before moving to Tennessee.

C. Proceedings In This Case

1. District Court Proceedings

Petitioners brought suit in district court challenging the Non-Recognition Laws as impermissibly infringing upon their federal constitutional rights to due process, interstate travel, and equal protection. Following full briefing, with supporting declarations, the district court granted petitioners' motion for a preliminary injunction, ordering respondents not to enforce the Non-Recognition Laws against the three couples during the pendency of this lawsuit. Noting the many "thorough and well-reasoned cases" decided by various federal district courts following *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), each of which held that state-law restrictions on marriage for same-sex couples "violate the Equal Protection Clause and/or the Due Process Clause, even under 'rational basis' review," the court held that petitioners were likely to succeed on the

merits of their challenges and that the other factors weighed in favor of a preliminary injunction. Pet. App. 121a-129a. Respondents appealed.

2. Appellate Proceedings

On April 25, 2014, the court of appeals stayed the district court's preliminary injunction and set the case for expedited consideration, in coordination with several other appeals concerning the marriage laws of each of the other states within the Sixth Circuit—Ohio, Kentucky, and Michigan. Pet. App. 101a-103a. On November 6, 2014, a divided panel of the court of appeals reversed the district court's order, rejecting on the merits petitioners' constitutional claims.

According to the majority, the constitutional questions presented in the four cases before them all "come down to the same question: Who decides" whether petitioners should be able to marry, the electorate or the judiciary? Pet. App. 15a. The majority concluded that recognition of petitioners' marriages should be achieved, if at all, only through the political process.

The majority stated that it was bound by this Court's order in *Baker* v. *Nelson*, 409 U.S. 810, 810 (1972), which dismissed a same-sex couple's appeal from a judgment rejecting their challenge to Minnesota's denial of a marriage license "for want of a substantial federal question." The majority nevertheless also addressed the merits of petitioners' claims. The court of appeals rejected petitioners' argument that the principles articulated in more recent decisions of this Court preclude Tennessee from refusing to recognize the marriages of same-sex couples. In particular, the court of appeals rejected petitioners' reliance on this Court's cases recognizing (a) the fundamental nature of the

right to marry, *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978); *Turner* v. *Safley*, 482 U.S. 78 (1987), (b) the constitutional right of two consenting adults to engage in intimate sexual relations, *Lawrence* v. *Texas*, 539 U.S. 558 (2003), and (c) the right of lawfully married couples to have their marriages respected by another sovereign, *Windsor*, 133 S. Ct. 2675. See Pet. App. 23a-26a, 46a-47a.

The majority also rejected petitioners' arguments that Tennessee violated their rights under the Equal Protection Clause by exclusively denying recognition to lawful out-of-state marriages of same-sex couples. Pet. App. 31a-39a. Applying rational basis review, the court found two rationales to support the laws of all four states.

First, the majority "start[ed] from the premise that governments got into the business of defining marriage, and remain in the business of defining marriage * * * to regulate sex, most especially the intended and unintended effects of male-female intercourse." Pet. App. 31a. The majority opined that "nature's laws (that men and women complement each other biologically) * * * created the policy imperative" behind marriage laws applying only to male-female couples. Pet. App. 32a.

Second, the majority identified as a rational basis for the challenged laws the possibility that "a State might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries." Pet. App. 34a.

In addition, in declining to apply any more searching review, the majority concluded that "animus" (as the majority defined it) did not lie behind the chal-

lenged laws, Pet. App. 40a, and that this was not "a setting in which 'political powerlessness' requires 'extraordinary protection from the majoritarian political process.'" Pet. App. 53a (quoting *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973)).

The court of appeals also rejected the argument that Tennessee had violated petitioners' constitutional right to travel by forcing them to relinquish their status as married under state law as a condition of moving to the State. The majority reasoned that Tennessee did not violate the right to travel because it discriminated against all same-sex couples equally—that is, Tennessee treated out-of-state same-sex couples who move to Tennessee the same as same-sex couples already residing in Tennessee. Pet. App. 65a. The majority did not address the unique harms to petitioners of having their already established marriages disregarded for all purposes under Tennessee law.

Judge Daughtrey dissented, explaining that she would have held that the court could permissibly adjudicate petitioners' constitutional claims and that the court should join the nearly unanimous recent conclusion of other jurists that the collective import of this Court's decisions over the past four decades dictates that a state may not constitutionally deny same-sex couples the right to marry on equal terms with opposite-sex couples. Pet. App. 82a-86a.

SUMMARY OF ARGUMENT

Petitioners are three same-sex couples who were lawfully married outside Tennessee and later moved with their families to the State for various personal and professional reasons. Petitioners' marriages, and the families they had established, were rendered legal nul-

lities under state law upon arrival in Tennessee. By making petitioners' legal surrender of their marriages a condition of entry into the State, Tennessee has violated petitioners' constitutional rights. Petitioners ask that their marriages receive the same recognition from Tennessee as the State affords other marriages.

Marriage is an institution of profound emotional and cultural significance and also one of intensely practical and legal import, affecting nearly every aspect of a married couple's life together. The Constitution shields from state interference the privacy of the marital couple to make many personal, intimate choices within marriage, including those related to parenthood, procreation, and physical intimacy. Accordingly, the Court has recognized that one's choice of spouse enjoys constitutional protection and has struck down state laws excluding various groups from entering marriage. The Court also has affirmed that the Constitution protects married couples' liberty and dignity interests in their existing marriages.

Despite these protections, Tennessee contends that same-sex couples who married out of state may be stripped of legal recognition of their marriages upon entering Tennessee because the State has traditionally excluded same-sex couples from marriage. The Court should reject that proposition. This Court has repeatedly struck down laws founded on "traditions" that demeaned and unjustifiably excluded disfavored groups, or limited individuals' ability to share in the same rights and benefits that others enjoy.

By stripping same-sex couples of their marital status as a condition of entry into the State, Tennessee has violated the most fundamental premises that tie us to-

gether as a single Nation. Non-recognition laws are currently inflicting serious injuries on thousands of families in the minority of states that continue to exclude same-sex couples from marriage. Contrary to the court of appeals' view, there is no justification to "wait and see" what "the long term impact" of including same-sex couples within marriage will be. It is beyond question that the exclusion of same-sex couples is harming those couples and their families in both the short term and the long term. This Court should not permit any state to deprive another generation of lesbian and gay persons of the opportunity to participate fully in marriage.

Tennessee's refusal to recognize petitioners' marriages is subject to strict scrutiny. No matter what level of scrutiny the Court applies, however, the rationales cited by the court of appeals as validating the Non-Recognition Laws do not justify denying petitioners legal recognition of the enduring relationships they established with their spouses upon marriage.

A. First, Tennessee's Non-Recognition Laws should be subject to strict scrutiny under the Due Process Clause because they impermissibly infringe upon same-sex couples' fundamental right to marry—a right that includes the freedom to choose one's spouse and the right to *remain* married. This Court has long recognized that "[t]he freedom to marry [is] one of the vital personal rights essential to the orderly pursuit of happiness by free [persons]." *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967). The Court also has emphasized that the Fourteenth Amendment "shelter[s]" marital relationships from "unwarranted usurpation, disregard, or disrespect." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 116 (1996). The Non-Recognition Laws ignore the marriages of

same-sex couples who enter Tennessee for no reason other than that the couples are of the same sex. Such treatment of same-sex couples' marriages is incompatible with the teaching of *Lawrence* v. *Texas*, that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and gay and lesbian persons "may seek autonomy for these purposes, just as heterosexual persons do." 539 U.S. 558, 574 (2003).

The Non-Recognition Laws also deprive same-sex couples of their constitutionally protected liberty and privacy interests in their existing marriages in further violation of the Due Process Clause. In *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), this Court explained that marriage confers on couples a "dignity and status of immense import" protected by the Constitution's due process guarantee, *id.* at 2692, and held that the federal government's refusal to recognize same-sex couples' marriages impermissibly "interfere[d] with the equal dignity of same-sex marriages," *id.* at 2693. Tennessee's refusal to recognize petitioners' marriages similarly deprives petitioners of their protected liberty interests without justification.

B. Second, the Non-Recognition Laws impermissibly burden petitioners' "virtually unconditional personal right, guaranteed by the Constitution to us all," to "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Saenz* v. *Roe*, 526 U.S. 489, 498, 499 (1999) (citation and internal quotation marks omitted). Any classification that burdens the fundamental right to travel is subject to strict scrutiny. *Shapiro* v. *Thompson*, 394 U.S. 618,

634 (1969); see *Saenz*, 526 U.S. at 499. The Non-Recognition Laws exact a severe cost on petitioners by making the price of traveling or moving to Tennessee the sacrifice of their legal status as spouses. That draconian burden on petitioners' right to travel cannot survive scrutiny.

C. Third, Tennessee's Non-Recognition Laws merit, at a minimum, the same "careful" equal protection scrutiny that this Court applied to the Defense of Marriage Act (DOMA) in *Windsor*. In *Windsor*, the Court gave "careful consideration" to DOMA both because the statute's disregard of valid marriages was unusual and because the measure's actual purpose and effect were to treat a class of married couples unequally. 133 S. Ct. at 2693, 2696. Tennessee's Non-Recognition Laws constitute an unusual departure from Tennessee's typical practice of recognizing all marriages that were valid where entered, except where the relationship is criminally proscribed. Moreover, the Non-Recognition Laws' "purpose and effect [are] to disparage and to injure those whom [petitioners' former home] State, by its marriage laws, sought to protect in personhood and dignity." *Ibid.* The Non-Recognition Laws cannot survive the careful scrutiny that *Windsor* prescribes.

However, the Non-Recognition Laws warrant even more heightened scrutiny because they discriminate on the basis of sex, both because they classify on the basis of sex, recognizing the marriages of women to men but not women to women or men to men, and because they impose and perpetuate gender-based expectations and stereotypes that the State may not enforce. The assumptions on which the laws are based do not hold true

for all women and men, and this Court should approach the laws with skepticism.

Moreover, the Non-Recognition Laws discriminate based on sexual orientation, and laws that discriminate on that basis should be subjected to heightened scrutiny. Such laws take aim at an integral aspect of personal identity, burden gay and lesbian persons' exercise of their constitutionally protected right to form relationships with a partner of the same sex, and are intimately linked with gender-based stereotypes or expectations that should be regarded with suspicion, rather than deference.

D. Fourth, whatever level of scrutiny is applied, the Non-Recognition Laws cannot pass muster because none of the purported interests relied upon by Tennessee or the court of appeals supports the State's non-recognition of petitioners' marriages. In particular, non-recognition *undermines* the welfare of the children of same-sex couples without any benefit to other children. Also, this Court has made clear that "tradition" or approval through the political process cannot justify depriving persons of their constitutional rights.

E. Finally, Tennessee's Non-Recognition Laws frustrate principles of federalism. Tennessee's laws are disrespectful toward the vital marital status that other states have conferred upon same-sex couples, thereby interfering with those states' efforts to protect enduring family relationships. Furthermore, our Nation's federal design serves not only to protect the interests of sovereigns, but also to "secure[] the freedom of the individual." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011). Laws such as Tennessee's erect barriers

that preclude same-sex couples and their children from enjoying the full rights of national citizenship.

ARGUMENT

I. TENNESSEE'S REFUSAL TO RECOGNIZE SAME-SEX COUPLES' EXISTING LAWFUL MARRIAGES WARRANTS STRICT SCRUTINY BECAUSE THAT REFUSAL INFRINGES UPON FUNDAMENTAL RIGHTS AND LIBERTY INTERESTS PROTECTED BY THE FOURTEENTH AMENDMENT

"[T]he freedom of choice to marry" is a fundamental right, grounded in the Constitution's guarantee of personal liberty and afforded the highest level of protection under the Due Process Clause. *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967). The right to marry includes the right to *be* married—that is, the right to be in an *enduring*, legally protected family unit, entitled to privacy and ongoing respect from the state. Once formed, marital relationships, like parent-child relationships, are among the intimate family bonds whose "preservation" must be afforded "a substantial measure of sanctuary from unjustified interference by the State." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 618 (1984). Tennessee's Non-Recognition Laws impermissibly infringe upon fundamental liberty interests for an entire class of persons, turning same-sex couples lawfully married in other states into legal strangers, and thereby undermining the stability of their families and their personal dignity. The injustices effected by Tennessee's Non-Recognition Laws are similar to those inflicted by Section 3 of DOMA, which this Court struck down in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013). The same outcome is appropriate here.

A. Tennessee's Non-Recognition Laws Impermissibly Infringe Upon Same-Sex Couples' Fundamental Right To Marry

This Court has recognized that, as a feature of the liberty guaranteed under our Constitution, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [persons]." *Loving*, 388 U.S. at 12. For many, marriage is "the most important relation in life." *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978) (citation and internal quotation marks omitted). It is a relationship conferring dignity and status, and serving many interests, among them protection of the couple and of any children they rear. See, *e.g.*, *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) (liberty protected by the Due Process Clause includes right "to marry, establish a home[,] and bring up children"). And all married couples—regardless of whether they are raising children—have a right to participate in the important legal protections and dignitary benefits that attach to the decision to marry. See, *e.g.*, *Turner* v. *Safley*, 482 U.S. 78, 95-96 (1987); cf. *Griswold* v. *Connecticut*, 381 U.S. 479, 485-486 (1965) (holding that married couples have a fundamental right to choose not to have children).

The freedom to enter into a marriage recognized by the state is protected by the Constitution because the intimate relationship that a person forms with a spouse, and the decision to formalize that relationship through marriage, implicate deeply held personal beliefs, choices, and values. "Choices about marriage, family life, and the upbringing of children are among associational rights * * * of basic importance in our society *[and are] sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disre-*

spect." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 116 (1996) (citation and internal quotation marks omitted) (emphasis added).

The constitutionally protected freedom to marry includes the freedom to choose whom to marry. In *Loving*, this Court explained that "the freedom to marry[,] or not marry, a person of another race resides with the individual and cannot be infringed by the State." 388 U.S. at 12. And "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that *the right to marry is of fundamental importance for all individuals.*" *Zablocki*, 434 U.S. at 384 (emphasis added). A state's refusal to recognize a marriage lawfully entered into in another jurisdiction based on the sex of the spouses interferes with the exercise of that constitutionally protected liberty. As the California Supreme Court recognized when it became the first state high court to strike down a ban on marriage by interracial couples, people are not "interchangeable," and "the essence of the right to marry is freedom to join in marriage with the person of one's choice." *Perez* v. *Lippold (Perez* v. *Sharp)*, 198 P.2d 17, 21, 25 (Cal. 1948).

Like the laws struck down in *Perez* and *Loving*, Tennessee's Non-Recognition Laws deny petitioners' liberty by disregarding their exercise of the freedom to marry the one person with whom each has forged enduring and irreplaceable bonds of love and commitment. Petitioners ask that the State of Tennessee respect their constitutional right to autonomy and privacy to the same degree, and in the same way, as it does for other married couples in Tennessee—by recognizing each petitioner's lawful marriage to the spouse each has chosen.

Same-sex couples have the same fundamental interests as other couples in the liberty, autonomy, and privacy associated with the freedom to marry, including legal protections, stability, and a loving and nurturing environment in which to raise children. The interests that form the basis for the fundamental right to marry and to remain married do not turn on the sex of the persons in the marital relationship. As this Court held in *Lawrence* v. *Texas*, "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and gay and lesbian persons "may seek autonomy for these purposes, just as heterosexual persons do." 539 U.S. 558, 574 (2003). Moreover, marriages of same-sex couples, like marriages of opposite-sex couples, "are expressions of emotional support and public commitment" that carry "spiritual significance" and implicate "the receipt of government benefits," "property rights," and "other, less tangible benefits," which together are part of the "constitutionally protected marital relationship." *Turner*, 482 U.S. at 95-96. Tennessee's Non-Recognition Laws deprive petitioners of all these constitutionally protected elements of a marital relationship, burdening their exercise of the freedom to marry the person of their choice before moving to Tennessee. That interference requires application of strict scrutiny.

"[T]he Fourteenth Amendment forbids the government to infringe * * * fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (citation and internal quotation marks

omitted); cf. *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 686 (1977) ("[W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."). Because the right to marry, which includes the right to remain married, is a fundamental right, *Zablocki*, 434 U.S. at 383, Tennessee's Non-Recognition Laws are subject to strict scrutiny and cannot stand unless narrowly tailored to serve a compelling state interest.

B. Tennessee's Non-Recognition Laws Deprive Same-Sex Couples Of Their Liberty And Privacy Interests In Their Existing Marriages

Our Constitution's guarantees of personal liberty protect decisions not only to enter into, but also to *maintain*, intimate family relationships, including marital relationships. Thus, this Court has recognized that, once a couple has married, privacy, autonomy, and associational rights attach to the marital relationship, protecting it from unjustified state intrusion. See, *e.g.*, *Griswold*, 381 U.S. at 485-486; see also *Glucksberg*, 521 U.S. at 720 (recognizing "marital privacy" as an established fundamental right); *Zablocki*, 434 U.S. at 397 n.1 (Powell, J., concurring in the judgment) (noting difference between "a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude" and "regulation of the conditions of entry into * * * the marital bond").

Once entered into, marriage is constitutionally protected "against the State's * * * disregard, or disrespect." *M.L.B.*, 519 U.S. at 116. "[B]ecause the Bill of

Rights is designed to secure individual liberty, it must afford the formation *and preservation* of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts*, 468 U.S. at 618 (emphasis added). Marriage "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486. Accordingly, this Court's precedent "demands * * * close consideration * * * when a family association so undeniably important is at stake." *M.L.B.*, 519 U.S. at 116-117. The marital relationship, no less than other family bonds, demands such protection and preservation.

This Court in *Windsor* underscored the liberty interests at stake here when it held that the federal government's refusal, pursuant to Section 3 of DOMA, to recognize the valid marriages of same-sex couples violated those couples' due process rights. In so holding, the Court explained that marriage confers upon same-sex couples and opposite-sex couples alike a "dignity and status of immense import." 133 S. Ct. at 2692. The Court further acknowledged "the *equal dignity* of same-sex marriages." *Id.* at 2693 (emphasis added). As *Windsor* recognized, when two individuals, regardless of their sex or sexual orientation, enter into a lawful marriage, they enter into a relationship that is protected against unjustified state interference as part of the "liberty" guaranteed by the Constitution's due process guarantee. As did Section 3 of DOMA, Tennessee's Non-Recognition Laws "deny the liberty protected by the Due Process Clause." *Id.* at 2695.

Like the plaintiff in *Windsor*, petitioners here are already legally married. They seek to be treated as equal, respected, and participating members of society

who—like other Tennesseans—are entitled to respect from the State for their marriages. Tennessee law denies them liberty by rendering these couples unmarried strangers under state law for as long as they live or stay within Tennessee's borders.

As was the case with DOMA, Tennessee's Non-Recognition Laws "seek[] to injure the very class [petitioners' states of prior residence] seek[] to protect." *Windsor*, 133 S. Ct. at 2693. Same-sex spouses who move or travel to Tennessee face the most egregious of intrusions into the privacy of their marriages—the erasure of their marital status under state law—solely because they are married to a spouse of the same sex. The impact on those couples' stability, security, and dignity is at least as severe as, if not greater than, that caused by federal non-recognition in *Windsor*. "The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship [their home state] has sought to dignify," and it "humiliates" the numerous "children now being raised by same-sex couples" in Tennessee. *Id.* at 2694 (citing *Lawrence*, 539 U.S. 558). Tennessee's Non-Recognition Laws interfere with the dignity, privacy, and autonomy of existing marital relationships and thus cannot withstand strict scrutiny under the Due Process Clause.

II. TENNESSEE'S NON-RECOGNITION LAWS WARRANT STRICT SCRUTINY BECAUSE THEY INFRINGE UPON MARRIED SAME-SEX COUPLES' FUNDAMENTAL RIGHT TO TRAVEL GUARANTEED BY THE FOURTEENTH AMENDMENT

Tennessee's Non-Recognition Laws warrant strict scrutiny for the additional reason that the laws infringe

upon married same-sex couples' fundamental right as citizens of the United States to travel to and take up residence in Tennessee. Those laws burden married same-sex couples' exercise of that right by rendering their marital status and legal family relationships "void and unenforceable" as the price of entering Tennessee. That heavy price no doubt deters some same-sex spouses from traveling to Tennessee. Others, due to family commitments, economic pressures, or, like Sgt. DeKoe, military service, will move to Tennessee despite that burden. In any case, such a severe legal barrier to interstate mobility is incompatible with one of the most basic premises of our Nation's federal system.

A. Because The Right To Travel To And Through Other States Is An Inherent Right Of United States Citizenship, Laws That Unreasonably Burden That Right Are Subject To Strict Scrutiny

The "right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution." *Williams* v. *Fears*, 179 U.S. 270, 274 (1900); see also *Saenz* v. *Roe*, 526 U.S. 489, 502-504 (1999) (observing longstanding "common ground" that the Privileges or Immunities Clause of the Fourteenth Amendment protects citizens from unreasonable burdens on their right to relocate to a new state). The Constitution's Framers recognized that the right to travel is "a necessary concomitant of the stronger Union the Constitution created." *United States* v. *Guest*, 383 U.S. 745, 758 (1966).

The fundamental right to travel guarantees to all citizens the liberty "to migrate, resettle, find a new job, and start a new life." *Shapiro* v. *Thompson*, 394 U.S. 618, 629 (1969). It constitutes a "virtually unconditional personal right, guaranteed by the Constitution to us all" to "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Saenz*, 526 U.S. at 498, 499 (internal quotation marks omitted). While any state law plainly "implicates the right to travel when it actually deters such travel," *Atty. Gen. of N.Y.* v. *Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion), a law may infringe that right even where there "is no evidence * * * that anyone was actually deterred from travelling by the challenged restriction." *Mem'l Hosp.* v. *Maricopa Cnty.*, 415 U.S. 250, 257 (1974). A law, like Tennessee's Non-Recognition Laws, that burdens the right to travel in an "indirect manner" also implicates the right. *Soto-Lopez*, 476 U.S. at 903.

Such laws are subject to strict scrutiny. "[A]ny classification which" burdens "the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Shapiro*, 394 U.S. at 634; see *Saenz*, 526 U.S. at 499.

B. By Nullifying Same-Sex Couples' Marriages Under State Law As The Cost Of Traveling Through Or Moving To The State, Tennessee Unreasonably Burdens Those Couples' Right To Travel

By treating the lawful marriages of same-sex spouses traveling through or moving to Tennessee as nullities under state law, the State imposes an unrea-

sonable burden on their right to travel. Tennessee cannot, consistent with the requirements of the Constitution, force a citizen of the United States to "choose between travel and [a] basic right" of citizenship, such as the liberty interest in one's marriage, absent a showing that such treatment is necessary to further a compelling state interest. *Dunn* v. *Blumstein*, 405 U.S. 330, 342 (1972) (rejecting Tennessee residency requirements of one year and three months for voting in state and county elections, respectively, as impermissibly forcing "a person who wishes to travel and change residences to choose between travel and the basic right to vote"). The price of admission into Tennessee for same-sex spouses is severe: They must relinquish their status as legally recognized family members, the dignity of their marriage, a fundamental aspect of their personhood, and all the rights, obligations, and protections that marriage provides. "[D]eprivation[] of * * * important benefits and rights can operate to penalize migration," *Soto-Lopez*, 476 U.S. at 907, and for many couples, the prospect of having their marriages disregarded will deter their travel to or through Tennessee altogether.

The Non-Recognition Laws also infringe upon same-sex spouses' right to travel by treating them adversely as compared to other married Tennesseans. The right to travel "protects residents of a State from being disadvantaged, or from being treated differently * * * from other similarly-situated residents." *Soto-Lopez*, 476 U.S. at 904; see *Saenz*, 526 U.S. at 500. Indeed, the deprivation here is far greater than those this Court has previously held invalid as violating the right to travel, for Tennessee's refusal to recognize petitioners' marriages is not a temporary disability, but a per-

manent one. See *Saenz*, 526 U.S. at 493 (one-year residency requirement); *Soto-Lopez*, 476 U.S. at 900 (civil service applicants denied bonus points—available only to certain applicants on one-time basis—but still eligible for state employment positions and to pursue other employment opportunities in the state); *Mem'l Hosp.*, 415 U.S. at 252 (one-year residency requirement); *Dunn*, 405 U.S. at 334 (three-month and one-year residency requirements); *Shapiro*, 394 U.S. at 622 (one-year residency requirement).

In rejecting petitioners' right-to-travel claim, the court of appeals erroneously compared married same-sex couples traveling to Tennessee to unmarried same-sex couples residing in Tennessee and concluded that there was no differential treatment because Tennessee does not permit its own resident same-sex couples to marry within the State. That comparison is inapt. As an initial matter, differential treatment of residents and travelers is but *one* way that a state may infringe upon the right to travel; a state measure may "unreasonably burden" that right by deterring travel to the state even in the absence of a differential treatment of residents and travelers. See *Saenz*, 526 U.S. at 499, 500 (listing multiple components of the right to travel and noting that the list is not exhaustive).

Here, Tennessee recognizes the marriages of opposite-sex couples traveling to or through the State, but treats married same-sex couples who enter the State as legal strangers. Moreover, while Tennessee's baseline rule is to recognize its residents' out-of-state marriages, regardless of whether they could have been entered into under Tennessee law, Tennessee refuses to recognize the out-of-state marriages of same-sex couples who cross its borders. By refusing to treat same-sex spous-

es as it does other married couples who reside in or travel to or through Tennessee, Tennessee places an unreasonable burden on same-sex couples' right to travel. That Tennessee also prohibits same-sex couples from marrying within the State does not absolve Tennessee's infringement of the constitutionally protected right of married same-sex couples to travel freely across the Nation without suffering the indignity of having their marriages disregarded in the process.

The Non-Recognition Laws also burden the parent-child relationships of married same-sex couples who travel or move to Tennessee. Petitioners Drs. Tanco and Jesty had a child together after moving to Tennessee, and Mr. Espejo and Mr. Mansell already had children when they moved to Tennessee. Pet. App. 166a-167a, 172a-173a, 175a, 178a. Tennessee's refusal to recognize their marriages communicates to their children and the world that their new State regards their family as second-class citizens, undeserving of the same respect as other families. See *United States* v. *Windsor*, 133 S. Ct. 2675, 2694 (2013).

By categorically depriving married same-sex couples traveling to Tennessee of their status as spouses under state law, the State has imposed an unreasonable burden on movement to or through the State that undermines the essential constitutional objective of "transforming many States into a single Nation." *Soto-Lopez*, 476 U.S. at 902. Each of the petitioner couples moved to Tennessee to pursue their careers, earn a livelihood, and establish a household together. In some instances, they had little choice in the matter, such as Sgt. DeKoe and Mr. Kostura, who moved to Tennessee when Sgt. DeKoe was stationed there by the United States Army following his deployment to Afghanistan.

Pet. App. 154a. By requiring them to forfeit one of the most basic rights of American citizenship as a condition of entering the State, Tennessee violates their fundamental right as United States citizens "to be treated as * * * welcome visitor[s] rather than * * * unfriendly alien[s]" when moving to or traveling through another state. *Saenz*, 526 U.S. at 500.

Petitioners' right-to-travel claim does not diminish Tennessee's traditional authority to withhold recognition from out-of-state marriages when it has a sufficiently weighty reason for doing so. The instances in which states historically have declined to recognize marriages generally have involved deterrence of abusive relationships or criminal misconduct—circumstances under which states likely can demonstrate that their restrictions pass constitutional muster. In contrast, Tennessee's categorical exclusion of the entire class of same-sex couples' marriages fails to "respect the constitutional rights of persons," *Windsor*, 133 S. Ct. at 2691, and conflicts with "the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State," *id.* at 2692. Rather than representing any traditional exercise of state authority to regulate marriage, Tennessee's Non-Recognition Laws are in fact a departure from constitutional tradition. Those laws warrant, and fail, strict scrutiny because they unreasonably burden married same-sex couples' fundamental right to interstate travel without being narrowly tailored to further any compelling purpose. See IV, *infra*.

III. TENNESSEE'S NON-RECOGNITION LAWS WARRANT HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE

Tennessee's disparate treatment of lawfully married same-sex couples warrants heightened scrutiny under the Equal Protection Clause. Tennessee's Non-Recognition Laws target the same class targeted in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), same-sex couples lawfully married in a state, thereby requiring at least the "careful consideration" that this Court applied in that case. Moreover, because the laws discriminate based on sex and sexual orientation, they require the State to make an exceedingly persuasive showing that the disparate treatment substantially furthers an important government interest. *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (*VMI*).

A. At A Minimum, This Court Should Apply *Windsor*'s "Careful Consideration" To Tennessee's Non-Recognition Laws

In *Windsor*, the Court held that DOMA's targeting of married same-sex couples required "careful consideration" under both due process and equal protection review. See 133 S. Ct. at 2693. This Court analyzed DOMA's actual "design, purpose, and effect" and concluded that DOMA's "demonstrated purpose" "raise[d] a most serious question under the Constitution's Fifth Amendment." *Id.* at 2693-2694. By analyzing DOMA's actual *demonstrated* purpose and effect to determine whether it raised constitutional concerns, the Court departed from rational basis review. Rather than deferring to Congress to "balance the advantages and disadvantages," *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955), the Court invalidated

Section 3 of DOMA on the ground that "no legitimate purpose *overcomes* the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Windsor*, 133 S. Ct. at 2696 (emphasis added). The Court's analysis therefore required more than a rational connection between DOMA and some legitimate, perhaps hypothetical, purpose; the Court required that the *actual* purpose of the law be one that was not only legitimate, but also one that was sufficiently strong to justify the purposeful imposition of inequality on only one group of married couples.

This Court applied "careful consideration" in *Windsor* for at least two reasons. First, the statute was an unusual measure—in departing from the federal government's longstanding practice of respecting a state's conferral of marital status. Second, DOMA's actual purpose and effect were to subject a particular group of married couples to unequal treatment. See 133 S. Ct. at 2693-2694 (holding that DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal).

Both of those reasons for applying "careful consideration" hold here as well. Tennessee's Non-Recognition Laws subject a particular group of married couples—same-sex couples who legally married in their homes states and then moved to Tennessee—to unequal treatment by departing from Tennessee's longstanding practice of recognizing marriages entered into in other states even when they could not be legally entered into in Tennessee. In addition, as with DOMA, the actual purpose and effect of Tennessee's Non-Recognition Laws are to treat same-sex couples unequally.

Tennessee's Non-Recognition Laws create two classes of couples who contracted legal marriages elsewhere: opposite-sex couples, whose marriages are almost universally recognized in Tennessee, and same-sex couples, whose marriages are rendered "void and unenforceable." That discrimination against a specific class of married couples represents a stark departure from Tennessee's long-standing practice of adhering to the "place of celebration rule" which ensures that "a marriage valid where celebrated is valid everywhere." *Farnham* v. *Farnham*, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009) (quoting *Pennegar* v. *State*, 10 S.W. 305, 306 (Tenn. 1888)). Prior to 1996, apart from unconstitutional anti-miscegenation laws that denied recognition of mixed-race couples' marriages, see James R. Browning, *Anti-Miscegenation Laws in the U.S.*, 1 Duke B.J. 29, 36 (1951), Tennessee's sole exception to the otherwise categorical "place of celebration rule" was to deny recognition to certain marriages lawfully contracted in another state, on a case-by-case basis, where the particular relationship would have subjected one or both parties to criminal prosecution in Tennessee. See, *e.g.*, *Rhodes* v. *McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970) (holding an out-of-state marriage between a stepfather and stepdaughter following the stepfather's divorce from the mother void where such marriage could be prosecuted as a felony).

Unlike Tennessee's otherwise limited, case-specific non-recognition of out-of-state marriages, the Non-Recognition Laws target and discriminate against same-sex couples who married out-of-state as a class. The language of the constitutional amendment makes express that it deprives only same-sex couples of the benefits of the "place of celebration rule": "The * * *

relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state"; and "[i]f another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state *by the provisions of this section*, then the marriage shall be void and unenforceable in this state." Pet. App. 132a (emphasis added).

Moreover, as was the case with DOMA, Tennessee's Non-Recognition Laws "seek[] to injure the very class [that petitioners' states of prior residence] seek[] to protect. By doing so [they] violate[] basic due process and equal protection principles." *Windsor*, 133 S. Ct. at 2693. The laws have the "principal effect" of "identify[ing] a subset of [out-of-state] marriages and mak[ing] them unequal," the "principal purpose" being "to impose inequality, not for other reasons like governmental efficiency." *Id.* at 2694. The laws "contrive[] to deprive" legally married same-sex couples, but not opposite-sex couples, "of both rights and responsibilities," and force same-sex couples to live as married for some purposes under the law of their former place of residence and federal law "but unmarried for the purpose of [Tennessee] law, thus diminishing the stability and predictability of basic personal relations [their former home states] found it proper to acknowledge and protect." *Ibid.* Through its laws, Tennessee "undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of [Tennessee's] recognition." *Ibid.*

At a minimum, therefore, the Court should subject the Non-Recognition Laws to the same "careful consideration" that the Court applied in *Windsor*. Here, as in

Windsor, no legitimate purpose "overcomes" the Non-Recognition Laws' deliberate imposition of inequality on married same-sex couples. See IV, *infra*.

B. Tennessee's Non-Recognition Laws Warrant Heightened Scrutiny Because They Discriminate On The Basis Of Sex

Tennessee's refusal to recognize the marriages of legally married same-sex couples who move to Tennessee warrants heightened scrutiny because that refusal discriminates based on sex—both by classifying persons based on sex and by imposing sex-based expectations and stereotypes. Under the heightened review such laws require, the Tennessee Non-Recognition Laws cannot stand unless the State can establish an "exceedingly persuasive" justification for them, including a demonstration "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *VMI*, 518 U.S. at 533 (citations and internal quotation marks omitted). Tennessee must make that showing without "rely[ing] on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Ibid.* Moreover, Tennessee's "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Ibid.* Here, the State's proffered justifications for its sex-based exclusion fail to meet the demands of heightened scrutiny, see IV, *infra*, and the Non-Recognition Laws cannot stand.

1. *Tennessee's Non-Recognition Laws expressly draw lines based on sex*

Tennessee's Non-Recognition Laws discriminate based on sex by drawing express sex-based lines. The laws recognize as married only a man who is married to a woman (but not a man who is married to a man), and only a woman who is married to a man (but not a woman who is married to a woman). On their face, these laws make a distinction based on sex.

Tennessee's laws classify based on sex for purposes of equal protection scrutiny even though they apply to both sexes, just as the anti-miscegenation law held unconstitutional in *Loving* v. *Virginia*, 388 U.S. 1 (1967), classified based on race even though the State there made the same argument advanced by the State here—that the laws applied equally to all races. The Equal Protection Clause's primary "concern [is] with rights of individuals, not groups," *J.E.B.* v. *Alabama*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring). "Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation." *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964). The equal application of interracial cohabitation bans or anti-miscegenation laws to persons of different races did not mean that such laws did not discriminate based on race. See *ibid.*; *Loving*, 388 U.S. at 7-9; see also *Powers* v. *Ohio*, 499 U.S. 400, 410 (1991) (holding "that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree" and that race-based peremptory challenges are invalid even though they may affect all races). The same reasoning applies to sex-based classifications. See *J.E.B.*, 511 U.S. at 140-142 (holding sex-based peremptory chal-

lenges unconstitutional even though they affect both male and female jurors).

For example, a state law providing that men may enter into business partnerships only with other men and that women may enter into business partnerships only with women would be subject to heightened equal protection scrutiny even though such a law restricts both sexes. Laws prohibiting individuals from marrying a person of the same gender discriminate based on sex in the same way and require heightened scrutiny for the same reason. See, *e.g.*, *Latta* v. *Otter*, 771 F.3d 456, 482-484 (9th Cir. 2014) (Berzon, J., concurring) (concluding that Idaho and Nevada laws excluding same-sex couples from marriage are sex-based classifications), petitions for cert. pending, Nos. 14-765, 14-788 (filed Dec. 31, 2014 & Jan. 2, 2015).

2. *Tennessee's Non-Recognition Laws discriminate based on sex by imposing overbroad gender-based expectations and stereotypes*

Tennessee's Non-Recognition Laws also discriminate based on sex by imposing gender-based expectations. In so doing, the laws perpetuate historical stereotypes regarding the respective roles of women and men in relationships and marriage (a point underscored by the State's proffered justifications for the laws' enactment, see IV, *infra*). These stereotypes have been reflected in numerous laws throughout history that have since been overturned through a combination of legislative action and constitutional review. See, *e.g.*, Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 205-206 (2000) (discussing the elimination of gender stereotyping from child and spousal sup-

port decisions); *Caban* v. *Mohammed*, 441 U.S. 380, 389 (1979) (holding that a New York Domestic Relations Law finding a "universal difference between maternal and paternal relations at every phase of a child's development" violated the Equal Protection Clause).

Laws denying recognition of same-sex couples' marriages, like other laws that this Court has found to discriminate impermissibly based on sex, are founded on "fixed notions" about the roles and preferences of men and women that states may not impose on individuals. *VMI*, 518 U.S. at 541 (quoting *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 (1982)). Tennessee's Non-Recognition Laws assume and impose expectations that a woman will form intimate, romantic, or sexual relationships only with a man, and that a woman will seek to, and should, form a household and raise a family only with a man. Similarly, the laws assume and impose expectations that a man will seek an intimate relationship and form a household only with a woman. Even if these assumptions hold true for many men and women, they do not hold true for all men and women. As this Court has explained with respect to gender stereotypes, "[t]he Equal Protection Clause * * * acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination." *J.E.B.*, 511 U.S. at 139 n.11; cf. *VMI*, 518 U.S. at 550 ("[G]eneralizations about 'the way women are,' [and] estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.").

Historically, marriage enshrined sex roles in law. For centuries, it was commonly understood that a married woman had no legal personality separate from that of her husband. "[T]hroughout much of the 19th century[,] * * * married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion). Under the principles of coverture, "a married woman [was] incapable, without her husband's consent, of making contracts * * * binding on her or him." *Bradwell* v. *Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring in the judgment). Additionally, a wife could not be party to a lawsuit without her husband's consent, and husbands were solely responsible for providing economic support. See Cott, *Public Vows* at 11-12, 54. And well into the twentieth century, spousal rape was largely not considered a crime, reflecting the law's acceptance of the idea that "the marriage constitute[d] a blanket consent to sexual intimacy which the woman [could] revoke only by dissolving the marital relationship." Model Penal Code and Commentaries, § 213.1 cmt. 8(c), at 342 (Original Draft and Revised Comments 1980).

Those laws now seem unthinkable. Over the past 40 years, laws pertaining to the marriage relationship have developed to eliminate virtually every vestige of historical sex roles. Today, "a combination of constitutional sex-discrimination adjudication, legislative changes, and social and cultural transformation has, in a sense," eliminated legal gender-based distinctions in marriage. *Latta*, 771 F.3d at 490 (Berzon, J., concurring). Married women and married men may own property, enter into contracts, work in professions, sue and be sued, and otherwise act independently of their

spouses. Spouses are entitled to economic support regardless of sex, and the same is true of child and spousal support in case of divorce. See Cott, *Public Vows* at 205-207. In addition, men and women are guaranteed legal equality with respect to children, for, as this Court has explained, "a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of" a couple's children. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 652 (1975) (citation omitted).

Viewed in light of this Nation's "long and unfortunate history of sex discrimination," *Frontiero*, 411 U.S. at 684 (plurality opinion), Tennessee's Non-Recognition Laws further a pattern of sex stereotyping that this Court's precedent forecloses. The traditional understanding of a marriage as between a man and a woman, with each fulfilling distinctive roles according to their sex, is no longer a presumption that state laws can enforce. Just as this Court has rejected sex stereotypes as a basis for other discriminatory state laws, it should do so here.

C. The Tennessee Non-Recognition Laws Also Warrant Heightened Scrutiny Because They Discriminate On The Basis Of Sexual Orientation

Tennessee's Non-Recognition Laws also warrant heightened scrutiny because they discriminate based on sexual orientation and because, for multiple reasons, such laws should trigger skeptical review. The laws challenged here categorically prohibit recognition only of the lawful out-of-state marriages of gay and lesbian couples, while applying the "place of celebration rule," with very limited exceptions, to the out-of-state mar-

riages of opposite-sex couples. In so doing, Tennessee's Non-Recognition Laws facially classify—and discriminate—based on sexual orientation.

This Court should clarify for courts below that official discrimination based on sexual orientation requires heightened scrutiny. The Court has repeatedly held unconstitutional laws that single out gay and lesbian persons for disfavored treatment because of their sexual orientation; however, the Court has never expressly decided the question, "still being debated and considered in the courts, [whether] heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation." *Windsor*, 133 S. Ct. at 2683-2684. The Court has had no need expressly to determine that question because each law discriminating based on sexual orientation that this Court has addressed in the last two decades was unconstitutional for reasons that were independent of whether heightened equal protection scrutiny should apply. See *id.* at 2695 (invalidating DOMA because "the principal purpose and the necessary effect of [the] law are to demean those persons who are in a lawful same-sex marriage"); *Lawrence* v. *Texas*, 539 U.S. 558, 574-575 (2003) (invalidating Texas sodomy prohibition on due process grounds); *Romer* v. *Evans*, 517 U.S. 620, 633 (1996) (explaining that Colorado's Amendment 2 "confounds [the] normal process of judicial review" because "[i]t is at once too narrow and too broad").

A holding by this Court that laws that discriminate based on sexual orientation must be subject to heightened scrutiny would be in line with this Court's precedents. Moreover, such a holding is necessary to fully effectuate the guarantee of equal protection of the laws for gay and lesbian persons, who otherwise must shoul-

der the burden, in every instance in which they are targeted by differential governmental treatment, of overcoming the presumption of validity that would otherwise attach to such treatment.

State action that discriminates based on sexual orientation warrants heightened scrutiny, rather than being presumed to be valid, for several reasons. As an initial matter, laws that discriminate on the basis of sexual orientation target a constitutionally protected aspect of personal identity and frequently burden individuals for exercising their constitutionally protected right to establish an enduring relationship with a partner of the same sex. "The liberty protected by the Constitution allows homosexual persons the right to make [the] choice" to engage in "intimate conduct with another person * * * [as] but one element in a personal bond that is more enduring." *Lawrence*, 539 U.S. at 567. Because the freedom to enter into a gay or lesbian relationship is constitutionally protected, courts should not presume that government has a legitimate interest in seeking to pressure individuals to alter or live inconsistently with their sexual orientation or in disadvantaging persons because they are gay or lesbian. For that reason alone, laws that discriminate based on sexual orientation warrant a more searching level of scrutiny than mere rational basis review.

It is also constitutionally offensive to presume that laws discriminating based on sexual orientation are valid, as further explained above, see III.B, *supra*, because such laws are very often based on gender-based stereotypes. In particular, laws that discriminate based on sexual orientation seek to impose gender-based expectations on individuals, and this Court repeatedly has emphasized that states have no legitimate

interest in enforcing such expectations. See, *e.g.*, *VMI*, 518 U.S. at 533 (explaining that state laws cannot be justified based on "overbroad generalizations about the different talents, capacities, or preferences of males and females"). Because laws that discriminate based on sexual orientation are intimately linked with gender-based stereotypes or expectations, courts should regard such laws with suspicion, not deference.

Moreover, classifications based on sexual orientation satisfy other factors that this Court has considered in deciding whether a particular discriminatory classification should be subject to heightened equal protection scrutiny. See *Frontiero*, 411 U.S. at 686 (plurality opinion); *Matthews* v. *Lucas*, 427 U.S. 495, 505-506 (1976).

First, as this Court's precedents have recognized, there is a longstanding history of discrimination against gay and lesbian persons. See *Lawrence*, 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."); see also *Windsor* v. *United States*, 699 F.3d 169, 182 (2d Cir. 2012) ("Perhaps the most telling proof of animus and discrimination against homosexuals in this country is that, for many years and in many states, homosexual conduct was criminal."), aff'd on other grounds, 133 S. Ct. 2675 (2013).

Second, government-sanctioned discrimination against gay and lesbian persons historically is unconnected to their unquestionable ability to participate and contribute equally in our society with all other citizens. While "[t]here are some distinguishing characteristics * * * that may arguably inhibit an individual's ability to contribute to society, * * * homosexuality is not one of them." *Windsor*, 699 F.3d at 182. A person's sexual

orientation ordinarily "provides no sensible ground for differential treatment," *City of Cleburne* v. *City of Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985), and laws that discriminate on this basis are "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," *Plyler* v. *Doe*, 457 U.S. 202, 216 n.14 (1982).

Third, as lower courts have recognized, sexual orientation is an integral part of one's identity that this Court has held a person must be permitted to express and that government has no legitimate interest in regulating. See *Hernandez-Montiel* v. *INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity * * * are so fundamental to one's identity that a person should not be required to abandon them."); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.").

Fourth and finally, gay and lesbian persons have historically suffered from political disadvantage and continue to experience such disadvantage. While they have achieved some political victories in some areas of the country in recent years, this progress does not demonstrate that they are fully and adequately protected from wrongful discrimination through the political process alone. Their political vulnerability is starkly illustrated by the vote in Tennessee to adopt the state constitutional amendment challenged in this case, which over 81 percent of Tennessee voters voted to enact. See J.A. 595-596.

All of these considerations support a determination by this Court that sexual orientation is a suspect basis on which to classify persons, as other courts to consider the question increasingly have held. See, *e.g.*, *Windsor*, 699 F.3d at 181. Indeed, since 2008, every state supreme court to consider under its respective state's equal protection guarantee whether laws that discriminate based on sexual orientation should be subject to heightened scrutiny has concluded that they should. See *In re Marriage Cases*, 183 P.3d at 429 (holding under the California constitution that "an individual's homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual's legal rights"); *Griego* v. *Oliver*, 316 P.3d 865, 884 (N.M. 2013); *Varnum* v. *Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 435 (Conn. 2008).

This Court should find that the Fourteenth Amendment provides the same protection. At present, some federal courts apply heightened scrutiny to laws that discriminate based on sexual orientation, but others continue to apply only rational basis review—based largely on pre-*Lawrence* circuit precedent that relied expressly on the now-overruled holding of *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), that states constitutionally may criminalize same-sex sexual intimacy. See, *e.g.*, *Lofton* v. *Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (relying in part on other courts of appeals' case law that was based in part on *Bowers*); *Veney* v. *Wyche*, 293 F.3d 726, 731-732 & n.4 (4th Cir. 2002); *Richenberg* v. *Perry*, 97 F.3d 256, 260 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997); *Jantz* v. *Muci*, 976 F.2d 623 (10th Cir. 1992), cert denied, 508 U.S. 2445 (1993); *Woodward* v. *United*

States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Padula* v. *Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). Even post-*Windsor*, the erroneous reasoning of *Bowers* has retained a lasting legacy in the application of rational basis review to equal protection challenges, including in the court of appeals' decision below. See, *e.g.*, *Bourke* v. *Beshear*, 996 F. Supp. 2d 542, 548 (W.D. Ky.) (observing that Sixth Circuit precedent applying rational basis review is "based * * * on a line of cases relying on *Bowers* v. *Hardwick*"), rev'd, *DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014), cert. granted (No. 14-574, Jan. 16, 2015); *Kitchen* v. *Herbert*, 961 F. Supp. 2d 1181, 1207 (D. Utah 2013), aff'd, 755 F.3d 1193 (10th Cir. 2014).

Laws that single out gay and lesbian persons for discrimination and exclusion from fundamental social institutions, like Tennessee's Non-Recognition Laws, are inherently suspect because they classify persons based on the sex of the person whom they love, an expression of their fundamental personal autonomy that the State has no legitimate basis to disfavor, and because they rely on impermissible gender stereotypes. All of the factors that this Court traditionally considers to identify when classifications are likely to be based on improper considerations, rather than on legitimate state interests, support a finding that distinctions based on sexual orientation are suspect.

IV. Tennessee's Proffered Justifications For Its Non-Recognition Laws Do Not Satisfy Any Level of Constitutional Scrutiny

Tennessee's Non-Recognition Laws warrant skeptical, and more than minimal, review for multiple reasons. As discussed above, the laws infringe upon same-

sex couples' fundamental rights to marry and to travel, thereby justifying strict scrutiny. In addition, the laws require heightened scrutiny because they target the same class disadvantaged by DOMA, thereby requiring at least the "careful consideration" applied in *United States* v. *Windsor*, 133 S. Ct. 2675, 2692 (2013), and because they discriminate based on sex and sexual orientation.

But regardless of what level of scrutiny this Court applies to the Non-Recognition Laws, they cannot withstand constitutional review. None of the purported interests relied upon by Tennessee or the court of appeals supports the State's non-recognition of petitioners' marriages. The State's interest in the welfare of children is actually *undermined* rather than furthered by the Non-Recognition Laws, which harm the children of same-sex couples without helping any other children. Moreover, tradition cannot, on its own, justify depriving citizens of their constitutional rights. The constitutional rights of a particular group cannot be put up for popular vote, nor should the enforcement of such rights be denied until such time as the group becomes sufficiently popular in the eyes of elected leaders or a majority of those who choose to vote in a particular election.

Finally, the State's invocation of principles of federalism and sovereignty misses the mark. By depriving same-sex couples of their marriage relationships solemnized by other states, Tennessee frustrates principles of federalism. As in *Windsor*, Tennessee's rule of non-recognition denigrates the enduring family relationships that other sovereign states sought to protect by conferring marital status. Contrary to our Nation's federal design, Tennessee has erected a barrier that

effectively creates two nations—in one of which, same-sex couples are not welcome unless they sacrifice their marital status. The Tennessee Non-Recognition Laws do not rationally promote a permissible public policy, much less satisfy heightened or strict scrutiny.

A. There Is No Rational Connection Between Tennessee's Desire To Provide Stability To Children And Its Refusal To Recognize The Marriages Of Same-Sex Couples

The State's interest in providing children with the stability of married parents—the only substantive policy interest relied on by Tennessee in the courts below—is actually *undermined*, rather than furthered, by the Non-Recognition Laws, which harm the children of same-sex couples without helping any other children. Tennessee's rule of non-recognition denigrates the enduring family relationships that petitioners and others created by marrying. Like many same-sex couples, two of the petitioner couples are raising children together. The family lives of their children, like those of other same-sex couples, are destabilized by Tennessee's refusal to recognize their parents' valid marriages. Harming these children does nothing to help the children of opposite-sex couples.

By denying to children raised by committed same-sex couples the stability and protection afforded by their parents' marriages, Tennessee's Non-Recognition Laws work against rather than advance the State's goal of supporting the raising of children within stable family units. Children who are being raised by same-sex couples benefit from the stabilizing force of marriage, just as children of opposite-sex couples do. While some children of same-sex couples may not be biologi-

cally related to one or both parents, that is irrelevant to the stability provided by marriage, just as it is for opposite-sex couples, because "biological relationships are not [the] exclusive determina[nt] of the existence of a family." *Smith* v. *Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977). "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children." *Id.* at 844 (citation, internal quotation marks, and brackets omitted).

The benefits of being raised by married parents do not differ depending on the sex of those parents. The scientific consensus of national organizations charged with the welfare of children and adolescents—based on a significant and well-respected body of research—is that children and adolescents raised by same-sex parents are as well-adjusted as children raised by opposite-sex parents. See Br. of American Psychological Association, et al. as Amici Curiae on the Merits in Support of Affirmance, *United States* v. *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307). "[R]esearch has shown that the adjustment, development, and psychological well-being of children are unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish." American Psychological Association, *Resolution on Sexual Orientation, Parents, & Children* (2004), http://www.apa.org/about/policy/parenting.aspx. Tennessee's Non-Recognition Laws irrationally deprive the children of same-sex couples of the equality and stability that marriage brings.

As with DOMA, Tennessee's Non-Recognition Laws and other states' similar laws "humiliate[] tens of thousands of children now being raised by same-sex couples" by making "it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. For children who have already been living within a legally recognized family, like the children of petitioners Mansell and Espejo, the loss of that status upon moving to Tennessee will no doubt be particularly unsettling. But the injury is just as great to children born to married couples like Dr. Tanco and Dr. Jesty after they relocate to Tennessee. Dr. Tanco and Dr. Jesty have a reasonable fear that Tennessee's refusal to recognize their marriage will cause their daughter to internalize the message that she and her parents are second-class citizens and that their family is inferior, thus undermining the sense of stability that her parents' marriage should provide her. Pet. App. 141a-142a, 152a.

Also as with DOMA, non-recognition "brings financial harm to children of same-sex couples" by denying benefits only afforded to those with a state-recognized parent-child relationship. *Windsor*, 133 S. Ct. at 2695. Under the Non-Recognition Laws, if Tennessee does not recognize a child's legal relationship with one of his or her parents, the child may be denied the right to have both parents involved in medical decision-making, see Tenn. Code Ann. §§ 36-6-101, 36-6-103; the ability to obtain health insurance and other employment-related benefits from a parent, see Tenn. Code Ann. §§ 56-7-2301, 36-5-101; the right to child support from a parent, see Tenn. Code Ann. § 36-5-101; the right to worker's

compensation benefits in the event of a parent's death, see Tenn. Code Ann. § 50-6-210; the right to intestate inheritance from a parent, see Tenn. Code Ann. § 31-2-104; the right to bring a wrongful death suit in the event of a parent's death, see Tenn. Code Ann. § 20-5-107; and numerous other statutory, common-law, and constitutional protections that attach only to a legally recognized parent-child relationship. Petitioners' efforts to replicate these legal protections as closely as possible through private means are no substitute, which is, of course, precisely why Tennessee provides the benefits by statute in the first place.

Finally, Tennessee's interest in advancing the well-being of children born to opposite-sex couples, by encouraging their parents to marry, is in no way undermined by extending the benefits of marriage to children of same-sex couples. Opposite-sex couples will continue to have identical inducements to marry even if Tennessee recognizes valid out-of-state marriages of same-sex couples who move to the State. The legal and personal benefits of marriage will not in any way be lessened for opposite-sex couples if same-sex couples and their children are also allowed to enjoy those benefits and protections. Tennessee's Non-Recognition Laws have the purpose and effect of denying stability to children by disadvantaging a subset of families—those with children being raised by same-sex couples—while providing no offsetting benefit to other families.

B. Deprivation Of Constitutional Rights Cannot Be Justified By Appeals To Tradition Or To Deference To The Political Process

The court of appeals' reliance on the State's purported interest in preserving the "traditional" defini-

tion of marriage as a union of a man and a woman does not withstand any level of scrutiny. Nor does the suggested interest in having any change to that tradition be adopted through the political process.

Preserving tradition for its own sake is not a valid basis for denying constitutionally protected rights to a group when, as in this case, the tradition involves a history of discrimination against that group. The "[a]ncient lineage of a legal concept does not give it immunity from attack" even under rational basis scrutiny. *Heller* v. *Doe*, 509 U.S. 312, 326 (1993). At the time of *Loving* v. *Virginia*, for example, the "traditional" definition of marriage in many states, including Virginia, was limited to an institution restricted to two persons of the same race. 388 U.S. 1, 6 (1967) (noting that laws against miscegenation had "been common in Virginia since the colonial period"). This Court's holding in *Loving* made clear that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence* v. *Texas*, 539 U.S. 558, 577-578 (2003) (quoting *Bowers* v. *Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

The purported "tradition" of refusing to recognize the marriages of same-sex couples is no more valid a basis for continuing to do so than was the tradition of excluding interracial couples. To begin, any purported tradition of refusing to *recognize* same-sex couples' marriages is actually of very recent vintage. Prior to the 1970s, there were no laws specifically barring same-sex couples from marrying. See Patrick Garvin, *A timeline of same-sex marriage in the US*, Boston Globe,

May 20, 2014, http://www.bostonglobe.com/2013/06/26/same-sex-marriage-over-time/mbVFMQPyxZCpM2eSQMUsZK/story.html (explaining that in 1973, "Maryland became the first state to pass a state statute banning same sex marriage"). And because marriages between same-sex couples have become commonplace only relatively recently, there is no tradition of nullifying those marriages when such couples move to a particular state. Tennessee's own Non-Recognition Laws were only adopted in 1996 (statutory bar) and 2006 (constitutional bar). To the extent those bans are supported by a longer "tradition," it is a tradition of expressing moral disapproval of gay and lesbian persons and their relationships—a tradition that, under this Court's precedent, cannot justify a discriminatory law. See *Windsor*, 133 S. Ct. at 2693; *Lawrence*, 539 U.S. at 571; cf. *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). The State's "traditional" exclusion of same-sex couples from the institution of marriage thus cannot be "the ending point" of the constitutional inquiry into the Non-Recognition Laws' validity. *Lawrence*, 539 U.S. at 572 (quoting *Cnty. of Sacramento* v. *Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

Moreover, to the extent there is a tradition of restricting marriage to a man and a woman, it is part of a broader tradition of sex stereotypes in marriage laws that have long since been abandoned by the states or declared unconstitutional. As explained above, see III.B.2, *supra*, marriage laws historically were part of a

larger web of laws that defined the distinctive roles of women and men in the economy, the society, and the family. Marriage laws imposing gender-based expectations now have been eliminated or ruled unconstitutional. In light of those developments, restricting marriage to a man and woman is anachronistic, "based simply on 'archaic and overbroad' generalizations." *Califano* v. *Goldfarb*, 430 U.S. 199, 216-217 (1977) (citation omitted). The invocation of "tradition" in this context does not provide a legitimate, much less important or compelling, purpose for such a law.

Similarly, public sentiment, as expressed in a popular vote, cannot be used to justify depriving petitioners of their fundamental right to continue their marriages. When fundamental rights are at stake, "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas* v. *Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-737 (1964). "[T]he freedom to marry or not marry * * * resides with the individual and cannot be infringed by the State." *Loving*, 388 U.S. at 12. Denying this constitutional right to same-sex couples is thus more than a political choice; it is "the superior force of an interested and overbearing majority" trampling "the rules of justice and the rights of the minor party." The Federalist No. 10 (James Madison). It is the responsibility of the judiciary to protect minorities, like the same-sex couples in this case, against such unlawful exercise of governmental power. See *Lucas*, 377 U.S. at 737 n.30 ("[T]he entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority." (internal quotation marks omitted)).

The court of appeals' deference to the political process is particularly inapposite with respect to petitioners, who moved to Tennessee after being lawfully married in other states. The political process within a state is uniquely unsuited to remedy burdens on the right to travel, which fall on those who are new residents or not yet citizens of the State, or even those simply traveling through temporarily on their way elsewhere. Petitioners had no say in whether Tennessee would recognize their marriages when they moved to the State. Moreover, by enshrining its rule of non-recognition in the state constitution, Tennessee has put this discriminatory principle beyond the reach of the normal democratic process. A proposed amendment to the Tennessee Constitution must be adopted through a cumbersome process that requires approval by a majority of both houses of the General Assembly, and then, in the following legislative session, the same amendment must be approved "by two-thirds of all the members elected to each house," after which, the majority of citizens voting for governor must also vote to approve the initiative. Tenn. Const. Art. XI, § 3. This process is even more burdensome than in *Romer* v. *Evans*, where this Court held that it is unconstitutional for a state to force gay and lesbian persons to go through the cumbersome process of "enlisting the citizenry of Colorado to amend the State Constitution" in order to enact nondiscrimination protections. 517 U.S. 620, 631 (1996).

Although judicial invalidation of state measures is a solemn matter, neither tradition nor deference to the political process are legitimate interests in the context of the fundamental rights to marry and to travel or in the context of equal protection of the law. See *Lucas*, 377 U.S. at 737 n.30 ("[T]hough the fact of enactment of

a [state] constitutional provision by heavy vote of the electorate produces pause and generates restraint [the courts] can not, true to [their] oath, uphold such legislation in the face of palpable infringement of rights. * * * It is too clear for argument that constitutional law is not a matter of majority vote." (citation and internal quotation marks omitted)).

C. Recognition Of Petitioners' Existing Marriages Furthers, Rather than Undermines, Principles Of Federalism

Federalism does not just safeguard the interests of the states and the federal government. Properly understood, "[f]ederalism [also] secures the freedom of the individual." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011). Inherent in our federalism is the idea that no government has "complete jurisdiction over all the concerns of public life." *Ibid.* Power is dispersed, and all government power, both federal and state, is limited by the need to respect the fundamental liberties of the people. See *Windsor*, 133 S. Ct. at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons."). As the Fourth Circuit has recognized, "*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." *Bostic* v. *Schaefer*, 760 F.3d 352, 379, cert. denied, 135 S. Ct. 308 (2014). Tennessee's "federalism-based interest in defining marriage therefore cannot justify its encroachment" on the fundamental liberty interests that came into existence when New York and California—other, equally sovereign states—solemnized petitioners' marriages. *Ibid.*

Because cooperation among states is an essential feature of horizontal federalism, the grant of a marriage license by one state should not lightly be disregarded by another. Although marriage recognition is generally a matter of state law, the relationships thereby established are, by their nature, intended to be enduring. In our mobile society, where couples routinely move between states, or even commute long-distance, the common practice of respecting marriages that were lawful where celebrated is essential to creating and maintaining bonds that are intended to endure. New York and California encouraged petitioners to form a lasting marital relationship, with all the attendant stability, security, and financial and emotional support that such a relationship can provide. By treating petitioners' relationships as though they never existed, Tennessee not only violated petitioners' fundamental rights, it also disrespected the important relationship status New York and California sought to confer when they solemnized petitioners' marriages—essentially preventing New York and California from creating an enduring marital relationship.

In order to ensure that "we are one people, with one common country," *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 840 (1995) (Kennedy, J., concurring) (quoting *Shapiro* v. *Thompson*, 394 U.S. 618, 630 (1969)), individuals must be able to travel throughout the Nation without being stripped of their marriages in the process, except where states have a sufficiently weighty interest in not recognizing certain marriages. In the context of marriage, "there is a strong policy favoring uniformity of result" because, "[i]n an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expecta-

tions of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere." *In re Lenherr's Estate*, 314 A.2d 255, 258 (Pa. 1974). Tennessee's Non-Recognition Laws can also, ironically, trap individuals in their marriages when they would otherwise choose to divorce, because Tennessee refuses to recognize that their marriages ever occurred. See *Borman* v. *Pyles-Borman*, Case No. 2014-CV-36 (Tenn. Cir. Ct. Aug. 5, 2014), slip op. 2 (same-sex couple lawfully married in Iowa denied divorce in Tennessee because marriage was "void and unenforceable" under Tennessee law). That problem is compounded by the fact that many states have residency requirements for granting divorce, see, *e.g.*, Ala. Code § 30-2-5, meaning that in order to obtain a divorce, at least one spouse might have to establish residency in a different state that recognizes same-sex marriage.

Our tradition of federalism entails respect by other states for the enduring relationships created between petitioners by New York and California. By breaking with the traditional, and Tennessee's own, "place of celebration rule," Tennessee does not promote principles of federalism; rather, it subverts them. A holding by this Court that states must respect the marriages of same-sex couples on the same terms as the marriages of opposite-sex couples would further fundamental principles of federalism on which our Union depends in order truly to be united.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

ABBY R. RUBENFELD
RUBENFELD LAW OFFICE, PC

WILLIAM L. HARBISON
PHILLIP F. CRAMER
J. SCOTT HICKMAN
JOHN L. FARRINGER
SHERRARD & ROE, PLC

MAUREEN T. HOLLAND
HOLLAND & ASSOCIATES, PC

REGINA M. LAMBERT

DOUGLAS HALLWARD-DRIEMEIER
CHRISTOPHER THOMAS BROWN
PAUL S. KELLOGG
SAMIRA A. OMEROVIC
JOSHUA E. GOLDSTEIN
EMERSON A. SIEGLE
JOHN T. DEY
ROPES & GRAY LLP

SHANNON P. MINTER
DAVID C. CODELL
CHRISTOPHER F. STOLL
AMY WHELAN
ASAF ORR
NATIONAL CENTER FOR LESBIAN RIGHTS

Counsel for Petitioners

FEBRUARY 2015